MAHADEVAN MAHALINGAM

v.

MANILAL & SONS (M) SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
ABDUL HAMID OMAR FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 119 OF 1983]
12 NOVEMBER 1983

BANKING: *Cheques - Endorsements on cheques and their effects.*

CIVIL PROCEDURE: *Whether the circumstances surrounding the advance of money fall within either of the sections - Limitation Act 1953, ss. 6, 21.*

LAND LAW: *Charges - Equitable charges - Creation of.*

The respondent, a limited liability company, and the deceased had a joint-venture business of buying and selling lands, by which the respondent would supply part of the capital in return for a charge on the lands or the deposit of titles with the parties' common solicitors. In a suit filed in the High Court, the respondent sued the executors and trustees of the estate of the deceased, for the recovery of two sums of money allegedly advanced to the deceased for the purchase of six pieces of land collectively known as the "Meera Estate". The two issues before the Court were therefore firstly, whether the deceased received the two sums of money and secondly whether the nature of transactions relating to the two sums were such that would determine whether or not the respondents suit was statute-barred.

Upon documentary evidence, the learned Judicial Commissioner found that the sums were received by the deceased for the purchase of Meera estate. Against this decision, the executors and trustees of the estate of the deceased appealed.

During the appeal, the FC reconsidered the two issues and in particular, (i) the legal status of endorsements on cheques and (ii) the possibility of an equitable charge arising whether the two sums were paid for the purchase of Meera estate and the effect on the suit in respect of the Limitation Act, ss. 6 and s. 21.

Held:

[1] The 1st sum of RM29,500 was received by the deceased as evidenced by the cheque being made out to the deceased and corroborated by corresponding entries in the respondent's ledgers.

[2] The 2nd sum was also received by the deceased in spite of the "A/C Payee Only cheque being made payable to one M/s. Ong Huck Lim & Co. Such a cheque crossing does not prevent the cheque from being transferable or non-negotiable. This was because, *inter alia*, there was an endorsement on the cheque by M/s. Ong to the deceased and a stamping impression of the collecting bank.

[3] That the first sum was clearly paid towards the purchase of Meera Estate, it gave rise to an equitable charge. Accordingly, it came under s. 21(1) of the Limitation Act and the action for recovery of this sum was not statue-barred.

[4] That from the letters and ledgers the second sum appeared to be advanced to the deceased to purchase lands for himself and not for the joint-venture arrangement between him and the respondent. Consequently, the advance of this second sum was personal loan and did not give rise to an equitable charge in favour of the respondent. In such a case, s. 6 of the Limitation Act applied and the action to recover this second sum was statute-barred.

[5] An equitable charge can be created for example where there is an agreement to secure a debt in favour of the creditor in respect of the debtor's land. Hence, the words "or other charge on land" in s. 21(1) Limitation Act includes equitable charges and liens.

[Appeal dismissed with costs.]

Cases referred to:
National Bank v. Silke [1891] 1 KB 435
A.L. Underwood Ltd. v. Bank of Liverpool & Martins [1924] 1 KB 775
Haji Abd. Rahman & Anor. v. Mohd Hassan [1917] AC 209
Arunasalam Chetty v. Teah Ah Poh Trading & Anor. [1937] 7 MLJ (KR) 17
Ngan Khong v. Bamah bt. Pakah Jamin & Anor. [1935] FMS LR 81
Vallipuram Sivaguru v. Palaniappan Chetty [1937] 6 MLJ (KR) 59
Mercantile Bank v. Official Assignee [1939] MLJ 196

Legislation referred to:
Evidence Act 1950, ss. 103, 106
Limitation Act 1953, ss. 6(1), 21(1)
Limitation Act 1939 [UK], s. 18
National Land Code Act 56/1965, Part Sixteen

Other sources referred to:
Halsbury's Statute, 3rd Edn. p. 77
Paget's Law of Banking, 8th Edn. pp. 256 - 259

For the appellants - G. Sri Ram; M/s. Sri Ram, Zulkifli & Kumar
For the respondent - C.V. Das (Gan Teik Chee with him); M/s. Shook Lin & Bok

JUDGMENT

Salleh Abas CJ (Malaya):

This is an appeal from the decisions of E.E. Sim, JC in a suit brought by the respondent, a limited liability company, against the executors and trustees of the estate of one Ratnavale (the deceased) in connection with the respondent's advance of two sums of money and the purchase by the deceased of six pieces of land in the district of Kulim, Kedah.

These six pieces are Lots 287, 288, 290 and 461 of Mukim of Kulim and Lots 2 and 3 of Mukim of Sungai Ular, Kulim, Kedah, all of which were part of an estate formerly called the "Meera Estate". To avoid confusion these six lots are referred to as the Meera Estate land.

The two sums advanced by the respondent were:

(a) RM29,500 paid on 20 December 1966 by a United Commercial Bank cheque No. PH 676645(P1); and

(b) RM250,000 paid on 21 March 1967 by Algemene Bank Nederland Cheque No. 056027 (P3), thus making a total of RM279,500.

The deceased repaid the respondent RM50,000 on 20 June 1968 by Malayan Banking cheque No. E 373666 (P5), thereby leaving a balance of RM229,500.

The deceased died on 9 April 1973 and his estate is now being administered by the present appellants.

There are only two issues involved in this appeal and these are:

(i) whether the deceased received these two sums; and

(ii) even if he did, whether the respondent's suit is not statute-barred and this question in turn depends upon the nature of the transactions relating to these two sums.

The first issue:

The learned judicial commissioner found that these two sums were received by the deceased and the evidence upon which he made such finding consists of the following documents:

(i) Exhibit P1 - a United Commercial Bank Ltd. cheque No. PH 676645 dated 20 December 1966 for RM29,500 in favour of the deceased;

(ii) Exhibit P3 - An Algemene Bank Nederland (GBN) cheque No. 056027 dated 21 March 1967 for RM250,000 in favour of M/s. Ong Huck Lim & Co. with an endorsement on its reverse side by the said M/s. Ong Huck Lim & Co. in favour of the deceased coupled with a stamping of Mercantile Bank Ltd., Penang, across the face of the cheque;

(iii) Exhibit P4 - a receipt issued by M/s. Ong Huck Lim & Co. dated 21 March 1967 for RM250,000;

(iv) Exhibit P5 - an Algemene Bank Nederland (GBN bank) paying-in slip dated 20 June 1968 in respect of a Malayan Banking cheque No. E 373666 for RM50,000 paid into the respondent's account No. 5-669.

(v) Exhibit P6 - the respondent's ledger in respect of the deceased's account for the years 1968 and 1969;

(vi) Exhibit P13, A, B, C, D & E - the respondent's balance sheets together with their trading and profit and loss accounts for the year 1965, 1966, 1967, 1968, 1969 and 1970.

Mr. Sri Ram who appeared for the appellants disputed the finding and submitted to us that no inference could be drawn from these documentary exhibits that the deceased had in fact received the proceeds of these two cheques.

As regards the first payment of RM29,500.00 we are of the opinion that it is proved beyond doubt that this sum was received by the deceased. The cheque (P1) which was made out in his name bears two stamping marks, i.e. those of the Mercantile Bank Ltd., Penang, and the United Commercial Bank. These impressions show that the cheque was paid into the Mercantile Bank and that this bank collected the proceeds of the cheque from the United Commercial Bank for the account of the deceased. Corroboration of the payment is found in the respondent's ledger under the heading of "M/s.", Meera Estate, Kulim", (see p. 2 of P2 and p. 2 of P9), to which the sum was debited. This amount also appeared in the respondent's balance sheets for the years 1967 and 1968 as "Meera Estate - Share account" (P13B and P13C).

As regards his finding in respect of the second sum of RM250,000, Mr. Sri Ram submitted strongly that it was wrong for the learned Judicial Commissioner to infer that the proceeds of the GBN cheque (P3) was received by the deceased because of a number of reasons.

In the first place the GBN cheque (P3) was made out in favour of M/s Ong Huck Lim & Co. with a crossing "A/c Payee only". In our view, this is not a serious objection. We agree with the opinion stated by PW1 in his evidence saying that although the cheque should go into the payee's bank account, it could also go into someone else's account if one knows the bank manager (p. 110 AR). The statement is completely in accord with the legal position regarding such crossing on a cheque. "The A/c Payee only" crossing is only a direction by the drawer, in this case the respondent, to the collecting bank, i.e. the Mercantile Bank into which the cheque was paid, that when it received the proceeds of the cheque from the paying bank, i.e. GBN bank, it must place them in the account of the named payee, in this case, M/s. Ong Huck Lim & Co. If the collecting bank received the proceeds for any other customer than the one named in the cheque, it ran the risk of being sued for negligence and could not avail itself of the protection under s. 85 of the Bills of Exchange Act 1949 - Revised 1978 - (Act 204). In any case, the crossing - "A/c Payee only" - does not prevent the cheque from being transferable or have the effect of making it not negotiable - *National Bank v. Silke* [1891] 1 KB 435; and *A.L. Underwood Ltd. v. Bank of Liverpool & Martins* [1924] 1 KB 775, per Scrutton LJ.

Mr. Ong Huck Lim, the payee endorsed the cheque (P3) with the words "Please pay to the credit of Mr. Ratnavale. This endorsement has the effect of showing that the proceeds would not go into Mr. Ong Huck Lim's account and in the absence of fraud the Mercantile Bank as the collecting bank was entitled to receive the proceeds for the named endorsee, i.e. the deceased. (see *Paget's Law of Banking*, 8th Edn., pp. 256 - 259).

In the second place, unlike the first cheque (P1), this cheque does not bear the stamping impression of the GBN bank, the paying bank, although the Mercantile Bank's stamp was impressed on it. Mr. Sri Ram submitted to us that the absence of stamping impression of the GBN bank means the no inference could be drawn that such proceeds were collected by deceased's bank i.e. the Mercantile bank. He further submitted that the cheque was probably returned to the respondent without payment because the respondent's name and account number were typewritten on the reverse side of the cheque. As to the stamping by the paying bank, we are unable to find any rule of law, nor did Counsel show to us any, requiring a paying bank to endorse its cheque as having been paid when it hands over the proceeds of the cheque to the collecting bank. In our view, such stamping is purely a matter of practice which varies from bank to bank. Some banks, like the United Commercial Bank as shown in its cheque, Exhibit P1, adopt that practice whilst other banks, like the GBN bank, probably do not. Further, to say that the cheque was returned to the drawer without payment is preposterous because there is no evidence to show that the cheque was dishonoured or that there was a fraud on the part of the respondent in continuing to show this sum in their ledger and balance sheets. We cannot fathom nor speculate as to why and by whom the name and the account number of the respondent, i.e. "Manilal & Sons (M) Ltd. 5-669" was typewritten on the reverse side of the cheque. No evidence was led in the trial regarding these words. Thus, whatever may be the significance which these words could convey, in our view, they certainly do not mean that the cheque was returned to the respondent without payment.

In the third place, Mr. Sri Ram said, there is a contradiction between the evidence of PW1 and the further and better particulars supplied by the respondent at the request of the appellants regarding the place where the cheque was handed to the deceased. In his evidence PW1 said that the cheque (P3) was handed to the deceased at the respondent's office because it was the deceased who took the cheque to Mr. Ong Huck Lim (p. 96 AR, and p. 110 AR) whereas in the further and better particulars the respondent stated that:

The payments were made as follows:

(1) ...

(2) By cheque ... at the office of the said solicitor by the said J.N. Patel.

thereby implying that it was Mr. J.N. Patel, and not the deceased, who took the cheque to the office of Mr. Ong Huck Lim. Mr. J.N. Patel was then managing director of the respondent. In our view, nothing turns out on this apparent contradiction. PW1 spoke of the cheque being taken by the deceased for the purpose of handing it to Mr. Ong Huck Lim, whereas the pleading emphasised on the **payment**, not the handing over of the cheque. However, even if this is to be regarded as a discrepancy, there can be no denial that after the cheque was received by Mr. Ong Huck Lim, he must have handed it to the deceased and that the deceased thereafter paid it into his bank, the Mercantile Bank, Penang. This conclusion is based on the receipt, P4, issued by Mr. Ong Huck Lim, the endorsement he made on the reverse side of the cheque in favour of the deceased and also the stamping impression of the Mercantile Bank, Penang.

In the fourth place, Mr. Sri Ram pointed out what he thought to be an apparent contradiction regarding the banking of RM50,000 repayment by the deceased towards this sum of RM250,000. According to PW1 the cheque was a Malayan Banking cheque whereas the paying-in slip (Exhibit P5) for that amount was that of the GBN bank. We do not see any contradiction here, because it is clear from P5 itself that the respondent paid in a Malayan Banking cheque No. E 373666 for RM50,000 into their GBN bank account No. 5-669. Surely, the paying-in slip to be used for the purpose should be that of the GBN bank and not that of the Malayan Banking and that the cheque paid in need not certainly be that of the GBN bank into which it was paid.

In our view, the inference that can be drawn from all this evidence is that the respondent had made out a cheque for RM250,000 to Mr. Ong Huck Lim, but that Mr. Ong Huck Lim did not receive the proceeds of the cheque - although he issued a receipt (Exhibit P4) for it - because he endorsed it in favour of the deceased. And as the deceased's signature appeared on the cheque together with the stamping impression of the Mercantile Bank, the irresistible inference is that the Mercantile Bank, into which the cheque was paid must have collected the proceeds for the deceased's account.

If the appellants denied the receipt of these sums and wished the Court to believe that the deceased did not receive them, it is they who should disprove the receipt. (See ss. 103 and 106 of the Evidence Act). But they do not deny it. They only required the respondent to prove it. Surely, the law does not require a party in a civil suit to prove a fact upon 100% certainty. As long as the evidence led results on a balance of probability in their favour, the respondent must be held to have discharged their onus of proof. It is not their duty to produce the deceased's account in the Mercantile Bank to show that the account was credited with these sums, but it is the duty of the appellants to do so, if they wish the Court to believe otherwise. In any case, the conduct of the deceased and the correspondence between his solicitors and those of the respondent do not indicate any denial of such receipt.

In our view the finding of the learned Judicial Commissioner regarding these two sums is correct and there is no reason at all for us to interfere with his finding.

The second issue:

The next issue is whether this suit which was commenced on 30 July 1974, i.e. more than seven years after the money was received, is not barred by limitation period. This question, however, in turn depends upon the purpose for which these two sums were paid and upon the nature of rights acquired by the respondent regarding these payments.

There are two provisions of the Limitation Act 1953 (Malaysia Act 254) which are relevant for this appeal. These are ss. 6 and 21(1), which are set out as follows:

> 6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-
>
> (a) action founded on a contract or on tort;
>
> ...
>
> (2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.
>
> x x x
>
> 21(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money occurred.

As the suit was commenced more than seven years after the event, it is statute-barred under s. 6 unless it falls within the provisions of s. 21(1) of the Act.

This section practically is word for word with s. 18 of the UK Limitation Act 1939 (*Halsbury's Statute*, 3rd Edn. p. 77). Mr. Sri Ram cautioned us to interpret this section in the light of our law and not with reference to the English law. We, of course, accept this submission. But, he further submitted that the words "other charge on land" in s. 21(1) of the Act must be interpreted to mean only legal charge as provided for in Part Sixteen of the National Land Code and that since these two lots, i.e. Lot 290 and Lot 461 were not so charged to the respondent, s. 21(1) of the Act does not protect this suit from being statute-barred.

In our view the relevant words in s. 21(1) of the Act for the purpose of this appeal are not merely the words "other charge on land", but the whole expression "a mortgage or other charge on land". It is this expression we must now construe.

Our land law does not recognise a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, i.e. ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognises a mortgage in the sense of Torrens system, referred to by text written as Torrens Mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security. For the purpose of avoiding confusion, our National Land Code drops the word "mortgage" and uses the word "charge" in place of Torrens mortgage. Thus, when s. 21(1) of our Limitation Act speaks of a "mortgage", it must mean a "charge" as understood and provided for in Part Sixteen of our National Land Code (see *Haji Abdul Rahman & Anor. v. Mohamed Hassan* [1917] AC 209 at 217). That being the case, the words "other charge on land" in the section, in our view, must mean other types of encumbrances to which the land is subjected. These could be an equitable charge or a lien, statutory or equitable which arises as a result of depositing a title deed with the lender.

The decision of the Privy Council in *Haji Abdul Rahman v. Mohamed Hassan (supra)* certainly does not prevent the creation of an equitable charge. In that case agreement to secure a debt by which the debtor transferred his land to the creditor and upon repayment the land would be transferred back to the debtor was held to be valueless as a transfer or burdening instrument, but was good as a contract. The right so created was not a legal right in the land but only a contractual right. The nature of this contractual right was amplified by Terrel, Ag. CJ in *Arunasalam Chetty v. Teah Ah Poh Trading & Anor.* [1937] 7 MLJ (KR) 17 at 21, to be a security for debt outside the provisions of the Land Code.

On the other hand if *Haji Abdul Rahman's* case *(supra)* is considered to have the effect of preventing the creation of an equitable charge, the effect of the decision cannot be extended to other cases. In that case the agreement was held void as a transfer or as a burdening instrument because in contravened s. 4 of the (Selangor) Registration of Titles Regulation 1891. This section prohibited the transfer, transmission or the creation of any mortgage or charge, or otherwise dealt with except in accordance with the provisions of this Regulation, and "every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same, except as aforesaid, shall be null and void and of non-effect,..." And s. 41 enacted that "whenever any land is intended to be charged or made security in favour of any person, the proprietor shall execute a charge in the form contained in Schedule E, which must be registered as hereinbefore provided".

But the subsequent Land Code and the present National Land Code do not contain provisions similar to s. 4 of the above-quoted Regulation, although the Codes make provisions as to how a charge or a lien could be created. Examination of Court's decisions clearly shows that the Courts have resorted to equitable principles and consistently held that an agreement or an agreement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the provisions of the National Land Code or the previous Code is executed or created. (see *Ngan Khong v. Bamah bt. Pakah Jamin & Anor.* [1935] FMS LR 81; *Arunasalam Chetty v. Teah Ah Poh Trading (supra); Vallipuram Sivaguru v. Palaniappa Chetty* [1937] 6 MLJ (KR) 59 and *Mercantile Bank v. Official Assignee* [1939] MLJ 196). The basis of this ruling is the very *raison d'etre* of the Court's own existence and the imputed intention of the legislature. Torrell, Ag. CJ in *Arunasalam Chetty's* case *(supra)* said:

> ... It is the duty of the Courts to do justice between parties, and unless expressly prohibited by Statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds ... (p. 22)

> ... but it is difficult to believe that it was the deliberate intention of the Kedah legislature by the mere omission to exclude the recognition of the principle of an equitable deposit. (p. 21)

These statements were supported by Whitley, Ag. CJ (SS) who sat in the same case and said:

> ... the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. (p. 18)

Raja Azlan Shah J (as he then was) reaffirmed this judicial attitude in *Mercantile Bank Ltd.* case *(supra)* when he said:

> ... unless there are express words in the Act, this Court is not precluded from giving effect to equitable rights existing between the parties ... (p. 197).

There is, however no provision in the National Land Code prohibiting the creation of equitable charges and liens. The Code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore equitable charge and liens are permissible under our land law. We, therefore, think that the words "or other charge on land" in s. 21(1) of the Limitation Act must be construed to include equitable charges and liens as well.

The next question is whether the transactions surrounding the payment of these two sums to the deceased resulted in an equitable charge in favour of the respondent. If they did, s. 21(1) applies and the suit is therefore not statute-barred; but if they did not, the suit is barred under s. 6(1) because of the lapse of more than seven years after the payments.

Whether or not these transactions created an equitable charge depend upon the intention and conduct of the parties at the time when the payments were made. It is the case of the respondent that they and the deceased had a joint-venture business of buying and selling lands, by which the respondent would supply part of the capital and before the land would be sold, it would be charged to them or at least its title deed would be deposited with the parties' common solicitors in order to secure the part capital which they had advanced.

There can be no dispute that the first sum of RM29,500 was meant to be a ten per cent (10%) deposit towards the purchase of Meera Estate land as this sum is accounted for as such in the respondent's ledger (P2, p. 2 and P9, p. 2) and in their balance-sheets (P13A, B, C, D & E). Moreover, no serious challenge was made by Counsel for the appellants on this issue.

But as regards the second sum of RM250,000 the evidence is not so clear-cut. Although this sum may well be used by the deceased to pay for the four lots comprising part of the Meera Estate land - because he took the transfer of these four lots within only a matter of one week after receiving the said sum - it is, however, not clear whether the purchase was his own purchase alone or a joint-venture one with the respondent. None of the witnesses who testified in this case really had personal knowledge of the matter. The people who knew this transaction were Mr. Ong Huck Lim, the common solicitor and Mr. J.N. Patel, who was the then managing-director of the respondent. Mr. Ong Huck Lim died in 1972 whilst Mr. J.N. Patel has left the respondent and now lives in Singapore. But he was not called to give evidence. Although he swore an affidavit on 7 December 1974 (p. 79 of Vol. II of AR) to the effect that the sum of RM250,000 was meant to be the respondent's half share in the purchase, in our view no reliance can be placed on this assertion because he was not then available for cross-examination.

Thus in order to determine whether the purchase of these lots was a joint-venture purchase or not the question must be decided solely in the light of the available contemporaneous documentary evidence.

If we look at the receipt (P4) issued by Mr. Ong Huck Lim, especially at the notation which reads - re charge of Grant No. 715 for Lot No. 461 and Grant No. 1171 for Lot 290 Mukim of Kulim - written on it, it would appear that these lots had to be charged to the respondent in order to secure the said sum, indicating therefore that the purchase was a joint-venture purchase. But if it were so, why was this sum not so accounted and treated in the respondent's accounts books and balance sheets? Instead the said sum was treated as a personal loan to the deceased. Only in the 1969 balance sheet was it treated by the respondent as their portion of the capital for the purchase of Meera Estate land. Until then, the deceased's account invariably shows a debit balance which included this sum, whilst the Meera Estate land account excluded this sum and only shows a debit balance of RM29,500 which was the first sum.

The change in the treatment of this sum was done by PW1 in 1969. In that year he made a note in the deceased's personal account that the RM50,000 repayment by the deceased towards the second sum of RM250,000 was a "part return of Meera Estate Capital". But this notation was not made contemporaneous with the event, it being made one year after the repayment and two years after the original sum was received by the deceased. When cross-examined as to why he wrote this notation, PW1 could only say "I did that as I was doing the accounts in 1969"

It is quite clear, therefore, that there was no basis for him to make this change. He had no personal knowledge of the matter because he was not involved in whatever arrangement the deceased had with his predecessor, Mr. J.N. Patel, regarding this sum. Only the latter and the common solicitor, Mr. Ong Huck Lim, and the deceased could clarify the matter. Of course, the last two cannot be raised from their graves but there seems to be no reason why Mr. J.N. Patel, who is still alive, could not be in Court, especially when the suit itself was commenced by him in his personal name and even the caveats against the land were applied for by him also in his personal name.

The result of all this must be that the second sum was not meant to be part of the respondent's capital to purchase the Meera Estate land but as a loan to the deceased and that whatever arrangement the deceased might have had with Mr. J.N. Patel, it did not appear to have involved the respondent as a party thereto.

This conclusion is clearly reflected by the application to impose the caveats on the land and the commencement of the suit, both of which - as we observed earlier - were made and commenced by Mr. J.N. Patel in his own name. Indeed, even the pre-writ correspondence which the deceased or the appellants received from the opposite solicitors clearly stated that these solicitors were acting for Mr. J.N. Patel and not for the respondent [see letter dated 19 August 1971 by M/s. Sharma and Company (p. 184 AR), letter dated 15 April 1974 by M/s. Gan Teik Chee (p. 184 AR), Vol. II and letter dated 2 November 1972 by M/s. Lim Kean Siew & Co. (p. 190 AR)]. If the second sum had been part capital of the joint-venture between the deceased and the respondent, surely the caveats would have been applied for and suit would have been commenced in their names and not in Mr. J.N. Patel's personal name and the solicitors' letters would not have referred to Mr. J.N. Patel, as their client. No explanation, however, was given on this gap and we certainly do not understand why this had so occurred.

This aspect of the matter was not dealt with by the learned Judicial Commissioner. His decision was based on two letters written By Mr. Ong Huck Lim dated 22 June 1971 and 8 July 1971 to the deceased requesting the latter to return two titles (*Surat Putus* Nos: 23731 and 23732). These two *surat putus* do not relate to any of the four lots comprising part of the Meera Estate lands. They certainly do not relate to Lots 290 and 461, for the titles of these two lots are *Surat Putus* SPK 1171 and SP 715. It would appear, therefore, that the two *Surat Putus*, the subject matter of Mr. Ong Huck Lim's letter, i.e. SP Nos: 23731 and 23732, must have belonged to other lots, possibly to lots 2 & 3 of Sungai Ular which Mr. J.N. Patel stated in the affidavit to have been deposited with Mr. Ong Huck Lim to secure the deceased's promise to charge lots 290 and 461 to the respondent. But as we have observed earlier the affidavits could not be made use by the Court.

Finally, we direct our attention to the various pre-writ letters written by both sides, some of which seem to show that the deceased had admitted liability for the said sum. But these letters were not contemporaneously written. Moreover, they were dealing with finding ways

and means as to how the respondent could recover the second sum. Therefore, in no way could an inference be drawn from these letters as to the real nature of the transaction in respect of this sum of money.

In our judgment there is no sufficient proof on the balance of probability that this sum was given to the deceased as the respondent's share of the capital of a joint-venture between them and the deceased to purchase the Meera Estate land. It would appear that the money was a personal loan to the deceased which at the time of the suit has become statute-barred. Thus except for the first sum of RM29,500 the appeal is allowed and it is allowed with costs.

As regards interest on the RM29,500, we think it is fair and proper that it should be at the rate of 3% from the date the deceased received the sum to the date of the judgment in the Court below and thereafter at the rate of 8% to the date of payment.

The deposit of this appeal should be refunded to the appellants.

Also found at [1984] 1 CLJ 286